HIGH COURT OF CHHATTISGARH AT BILASPUR

Single Bench : Hon'ble Shri Dilip Raosaheb Deshmukh, J.

Civil Revision No.110 of 2007

Applicant Defendant No.1 — Ubheram, S/o Milan Sahu, 40 years, R/o Village Jhinjhari, Tahsil Dongargarh, Distt. Rajnandgaon (C.G.)

versus

Non-Applicants

1. Parasram, S/o Keja Sahu, 90 years, R/o Village Jhinjhari, P.H. No.22, Tahsil Dongargarh, Distt. Rajnandgaon (C.G.)
2. State of Chhattisgarh, Through Collector, Rajnandgaon (C.G.)

Civil Revision u/s 115 of the Code of Civil Procedure

Present : Shri Prafull Bharat, counsel for the applicant.
Shri Akhil Agrawal, Panel Lawyer for the State/non-applicant No.2.

ORDER

(Passed on 17th of September, 2007)

Heard on admission.

(2) The applicant/defendant is aggrieved by the order dated 21-08-2007 passed by the Civil Judge Class-II, Dongargarh in Civil Suit No.9-A/2006, whereby his application under Section 11 of the Code of Civil Procedure for rejection of the plaint on the ground that the suit was barred on the principle of *res judicata* was dismissed.

(3) Admittedly, non-applicant No.1/plaintiff had instituted Civil Suit No.9-A/2006 against the applicant/defendant for declaration of title over 78 decimals of land out of Khasra No.293 (old Khasra No.244) situated in Village Jhinjhari, Patwari Circle No.22, Revenue Circle Lal Bahadur

Nagar, Tahsil Dongargarh and for permanent injunction to restrain the applicant/defendant from interfering with the possession of non-applicant No.1/plaintiff.

(4) The earlier suit, i.e., Civil Suit No.10-A/2006 was filed by the applicant/defendant herein before the Civil Judge Class-II, Dongargarh for permanent and mandatory injunction against non-applicant No.1/plaintiff herein in relation to land Khasra No.321 area 1.64 acres situated in Village Jhinjhari. In that suit, despite the fact that the applicant/defendant herein did not make any averments or seek any relief in relation to Khasra No.293 area 78 decimals non-applicant No.1/plaintiff herein ~~had~~, to show the conduct of the applicant/defendant, had in the written statement averred that the applicant/defendant herein was also interfering with his possession over the land Khasra No.293 area 78 decimals and an appeal was pending before the Board of Revenue. No relief was claimed by either party in relation to this land.

(5) The earlier suit filed by the applicant/defendant herein was dismissed. A finding on issue No.5 was recorded that since non-applicant No.1/plaintiff herein did not adduce any evidence in relation to his pleadings regarding Khasra No.293 area 78 decimals, no finding could be recorded on the issue.

(6) The application filed by the applicant/defendant herein under Section 11 of the Code of Civil Procedure was rejected on the ground that the subject matter of the two suits was different because in the present suit, the suit land was Khasra No.293 (old Khasra No.244) area

6.52 acres, whereas in the earlier suit, the suit land was Khasra No.321 area 1.64 acres situated in Village Jhinjhari.

(7) Learned counsel for the applicant/defendant placed reliance on ***Ramadhar Shrivas*** **vs.** ***Bhagwandas,*** **(2005) 13 SCC 1** and argued that the finding recorded by the Civil Judge Class-II, Dongargarh in the earlier suit, i.e., Civil Suit No.10-A/2006 on issue No.5 operates as constructive *res judicata.* In my considered opinion, the argument is liable to outright rejection. A matter is actually in issue when it is in issue directly and substantially and a competent Court decides it on merits. A matter is constructively in issue when it ought to have been made a ground for defence or attack in the former suit. Since ~~in the present suit~~, the subject matter of the two suits is entirely different and non-applicant No.1/plaintiff herein was in fact not required to make any averment with regard to Khasra No.293 for the just decision of the earlier suit, it cannot be said that the rule of constructive *res judicata* applies to the present case. It is clear that in the earlier suit neither the Court had recorded any finding in relation to Khasra No.293 nor was it required to do so since the question of possession over Khasra No.293 was not a matter directly and substantially in issue in the earlier suit. The doctrine of constructive *res judicata* engrafted in Explanation IV to Section 11 of the Code of Civil Procedure does not apply to the facts of the case. There is one more reason as to why the trial Court was right in rejecting the application under Section 11 of the Code of Civil Procedure. As is clear from the record, the previous suit was dismissed in favour of non-applicant No.1/plaintiff herein and he could not prefer any appeal against the said judgment and decree. The present suit is in relation to Khasra No.293 area 6.52 acres, whereas in the earlier suit, the relief

was claimed in relation to Khasra No.321 area 1.64 acres. Thus, the subject matter in the present suit was not the subject matter of the previous suit. The case law cited by the applicant is distinguishable and does not apply to the present case.

(8) For the foregoing reasons, in my considered opinion, the impugned order dated 21-08-2007 passed by the Civil Judge Class-II, Dongargarh in Civil Suit No.9-A/2006 does not suffer from any such illegality or manifest error as would warrant interference in this revision. The civil revision is accordingly dismissed at the stage of admission itself.

Sd/-
Dilip Raosaheb Deshmukh
Judge

Gopal